ARAB-MALAYSIAN PRIMA REALTY SDN BHD

v.

SRI KELANGKOTA-RAKAN ENGINEERING JV SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-113-1997]
25 AUGUST 1998

CIVIL PROCEDURE: *Contempt of court - Breach of court order - Mitigation - Whether 'breach contempt' less serious - Apology - Intention to commit contempt - Useful member of society - Whether custodial sentence necessary - Principles of sentencing in civil contempt*

The 3rd defendant was found guilty on two counts of contempt of court for failing to allow the plaintiff's servants access to a housing project in Kayangan Heights on two occasions thereby contravening an injunction which was earlier granted by the court. In mitigation, counsel for the 3rd defendant submitted, *inter alia*, that the breach of an injunction was a less serious class of contempt, that the 3rd defendant never had the intention to commit any form of contempt, that she had failed to appreciate that she was committing acts of contempt, that she had apologised, and that she is a useful member of society. Counsel therefore prayed for leniency and urged the court not to impose a custodial sentence.

Held:

[1] From the facts and circumstances, the conduct of the 3rd defendant before, throughout and after the whole of the committal proceedings reflected a deliberate conduct constituting unmitigated repentance and was clearly an affront to the authority of the court.

[2] An apology must be made in a clear, unambiguous and unqualified statement; and to be effective it must be given at the earliest possible opportunity in order to show remorse or repentance and not as an afterthought subsequent to a finding of guilt and conviction.

[3] It is hardly justifiable for a person of the 3rd defendant's standing to commit a contravention of an order of the court on two successive occasions. Her acts could not be expected to attract a relatively lenient treatment from the court for they clearly constituted unrelenting interference with the due administration of justice.

[Fine of RM30,000 on the 1st count and 3 months' imprisonment on the 2nd count.]

Case(s) referred to:
AG v. Arthur Lee Meng Kuang [1987] 1 MLJ 206 ***(refd)***
Anthony Ratos Domingos Ratos v. City Specialist Centre Sdn Bhd (t/a) City Medical Centre (Attorney-General, Intervener) [1996] 3 MLJ 349 ***(refd)***
Brewer v. Brewer [1989] 2 FLR 251 ***(refd)***
Brig ET Sen (Rtd) v. E Narayanan & Ors AIR [1969] Delhi 201 ***(foll)***
Burton v. Winters [1993] 3 All ER 847 ***(refd)***
Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 ***(foll)***
Chung Onn v. Wee Tian Peng [1996] 5 MLJ 21 ***(refd)***
Dr Leela Ratos & Ors v. Anthony Ratos Domingos Ratos & Ors [1997] 3 CLJ Supp 330 ***(refd)***
Ex p Jones [1806] 13 Ves 237 ***(refd)***
Javade-Babreh v. Javadi Babreh (Independent, 16 November 1992) ***(refd)***
Lee Lim Huat v. Yusof Khan Ghows Khan & Anor [1997] 3 CLJ 197 ***(refd)***
My Shareef v. Hon Judges of The Nagpur High Court AIR [1955] SC 19 ***(refd)***
R v. Thomson Newspapers Ltd & Ors [1968] 1 All ER 268 ***(refd)***
Ramnikal v. Pramlal AIR [1952] Kutch 74 ***(refd)***
Re R (a minor) (Contempt: Sentence) [1994] 2 All ER 144 ***(refd)***
Shoreditch County Court v. De Madeiros (Times, 24 February 1988) ***(refd)***
Superintendent and Remembrancer of Legal Affairs Bihar v. Murali Manohar Prasad [1941] 42 CLJ 225 ***(refd)***
Taylor v. Persico (Times, 12 February 1992) ***(refd)***
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v. SM Idris Anor [1990] 1 CLJ 723 ***(refd)***
Wee Choo Keong v. MBf Holding Bhd & Anor [1995] 3 MLJ 549 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8, 126

Other source(s) referred to:
The Law of Contempt, Nigel Lowe & Brenda Sufrin, 1996, pp 527, 630

For the plaintiff - Mah Weng Kwai (Ahmad Moosdeen with him); M/s Chan Moosdeen & Partners
For the defendant - Cecil Abraham (P Gananathan & Kanesh Sundram with him); M/s Logan Sabapathy & Co

Reported by Izzaty Izzuddin

JUDGMENT

Low Hop Bing J:

Prelude

On 27 July 1998, I found the 3rd defendant Khalijah bt Hasnan @ Mazura Abdullah guilty of two counts of contempt of court and recorded convictions thereon against her. The nature of the two counts of contempt committed by the 3rd defendant have been adequately alluded to in the principal judgment above leading to the convictions and would require no repetition here.

Respective counsel for the 3rd defendant and for the plaintiff had on 11 August 1998 concluded their respective comprehensive submissions; that by learned counsel for the 3rd defendant is in mitigation of sentence, while that by learned counsel for the plaintiff is in aggravation of sentence. In addition, the 3rd defendant read a statement in which she tendered her apologies for failing to allow access to plaintiff's servants to the massive and huge housing development in Kayangan Heights on 30 August 1997 and 23 October 1997, thereby contravening the injunction granted by this court on 20 August 1997. The 3rd defendant added that she failed to appreciate the seriousness and solemnity of court injunctions.

Submissions By Learned Counsel For 3rd Defendant

It is argued for the 3rd defendant that:

1. she never had the intention of committing any form of contempt of court here;
2. the 3rd defendant has no record of previous conviction of contempt of court arising out of a breach or contravention of a court order;
3. the contemnor has made a full and frank disclosure of all the pertinent events and has taken full responsibility for breaches or contraventions of the court order;
4. the 3rd defendant has apologised for the breach;
5. there was no continued breach or contravention;
6. breach of the injunction is a less serious class of contempt;
7. the 3rd defendant has failed to appreciate that she was committing two acts of contempt; and
8. the 3rd defendant is a useful member of society.

Reply By Learned Counsel For The Plaintiff

It was contended for the plaintiff that the 3rd defendant's two acts of contempt were flagrant challenges to the authority of the court. He asked the court to consider the conduct of the contemnor before, during and after the contempt proceedings. The particular facts of this case must be considered and he prays for a custodial sentence in view of the contemnor's repeated conduct. The contemnor should be made to realise the seriousness of her repeated acts of contempt. The apology was not sincere.

Decision Of The Court

In determining the appropriate sentence to be meted out in this case, I have taken into consideration the following fundamental factors *viz:*

3rd Defendant's Apology

The 3rd Defendant read a text which was obviously prepared by one who is learned in the law as the words used are commonly used by a person possessing a legally trained mind. The relevant portion of the statement, marked as exh. D12, included the following:

(1) Apologies for being late in attending to the proceedings fixed for the 27 July 1998, which was the day she was found guilty of the aforesaid two acts of contempt;

(2) Apologies for failing to allow access to the plaintiff's servants and agents on 30 August 1997 and again on 23 October 1997;

(3) First experience with respect to court injunctions and failure to fully appreciate the seriousness and solemnity of court injunctions; and

(4) Pray for mercy and leniency.

It is to be noted that throughout the entire committal proceedings, the 3rd defendant has instructed a large team of advocates and solicitors, initially to set aside the *ex parte* leave granted to the plaintiff, then to raise objections to the substantive motions for committal proceedings and finally to contest and challenge very comprehensively each and every conceivable and possible point known to the rules of procedure and substantive law in defence or justification of her acts of contempt. It is clearly within her legal rights to do so and there is nothing objectionable about her manner of instructing her team of learned counsel to defend her. However, her purported apologies run counter to her own conduct in that she has never shown to be even remotely remorse at all. It is evident to me that her conduct throughout the whole of the committal proceedings reflected a conduct constituting unmitigated repentance and was indeed an affront to the authority of the court.

Further, in my view, an apology to be effective must be given immediately in the 3rd defendant's affidavits filed for the hearing of the substantive notice of motion in order to show her remorse or repentance at the earliest opportunity, and not as an afterthought, subsequent to a finding of guilt and conviction against her. The apology must be made in the form of a clear, unambiguous and unqualified statement. Support for my proposition in this connection is to be found in the judgment of Dua, CJ in *Brig. E.T. Sen (Retd) v. E. Narayanan & Others (Air)* [1969] Delhi 201, where the learned Chief Justice said:

> Apology has to be offered clearly at the earliest opportunity indicative of remorse and contrition which is the essence of the purging of a contempt and it should not be offered in the hope and with the object of avoiding punishment. Apology and justification ill go together. It is therefore wrong on the part of a lawyer to contend that if the Court finds his client's conduct as amounting to contempt of Court, then he is willing to tender an unconditional apology.

The position would have been different if the 3rd defendant had tendered her clear, unambiguous and unqualified apology at the earliest opportunity when he affirmed her affidavits in reply to the plaintiff's affidavits filed in support of the substantive notice of motion or in any event before the hearing of the application ie, the substantive notice of motion, in order to enable the court to consider the apology as an additional mitigating factor. (See *Chung Onn v. Wee Tian Peng* [1996] 5 MLJ 21 at 524 HC; *Attorney-General v. Arthur Lee Meng Kuang* [1987] 1 MLJ 206 at 210 SC; *Ramnikal v. Pramlal* (AIR) [1952] Kutch 74; *My Shareef v. Hon. Judges Of The Nagpur High Court* (AIR) [1955] SC 19; *Javade-Babreh v. Javadi Babreh* [1992] Independent 16 November, CA; *Taylor v. Persico* [1992] Times, 12 February CA; and *Shoreditch County Court v. De Madeiros* [1988] Times, 24 February CA; *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp. 518, 560 & 561).

In England, a genuine remorse in the form of apologies to the court was held to be a highly significant factor which enables the court to reduce a sentence of 18 months to 12 months: *RE R (a minor) (Contempt: Sentence)* [1994] 2 All ER 144; Nigel Lowe and Brenda Sufrin, 1996 *"The Law of Contempt"* p. 630.

In the absence of an apology or contrition, a contemnor cannot subscribe to an expectation of a less severe sentence. On the contrary, eg, in England, where the contemnor shows no remorse, he can expect to be punished more severely: (*Burton v. Winters* [1993] 3 All ER 847 CA; *Brewer v. Brewer* [1989] 2 FLR 251; Nigel Lowe and Brenda Sufrin, 1996. *"The Law of Contempt"* p. 630).

No Intention Of Committing Contempt

Intention or *mens rea* is not an essential ingredient for the purpose of finding a person guilty of contempt of court in general or contempt by a breach or contravention of a court order ("contravention contempt") in particular, as in the instant case. I have explained this in considerable detail in my principal judgment after hearing the substantive notices of motion resulting in the convictions recorded against the 3rd defendant.

Whether or not the 3rd defendant has the intention of committing contempt is to be determined, not by reference to the statement from the Bar or the 3rd defendant's statement read in court, but by reference to all the facts and circumstances of the case here including, most importantly, the conduct of the 3rd defendant as *mens rea* is a mental element in which direct evidence is not easily available. The 3rd defendant is, first of all, as submitted by her learned counsel, a very active member of our society and has shown herself to be a successful and astute entrepreneur. She is presently a director in several companies and plays an active management and executive role or function in no less than ten private companies which are in the construction, high technology supplies, direct selling and landscaping business. The injunction concerning access to the housing development in question is clear and unambiguous and leaves no room for doubt. Yet, there had been repeated acts of breach or contravention.

In the light of the conclusions which I have arrived at in the principal judgment, I am unable to agree with the submission of the learned counsel for the 3rd defendant that the 3rd defendant has never had the intention of committing any form of contempt of court here. On the contrary, from the totality of the facts and circumstances, it is reasonable and indeed inevitable for me to conclude that the 3rd defendant has every deliberate intention to commit the two acts of contempt which are extremely serious matters meriting very serious punishment: per Lord Erskine LC in *Ex p Jones* [1806] 13 Ves 237 at 239.

Of course, if from all the circumstances of the case, a court finds that a contemnor in fact does not have the intention whatsoever of committing contempt of court, then that court may consider such an absence of intention as an important mitigating factor in meting out the appropriate sentence: per Harries CJ in *Superintendent And Remembrancer Of Legal Affairs Bihar v. Murali Manohar Prasad* [1941] 42 CLJ 225 at 234. However, this is not the case in the proceedings before me.

Useful Member Of Society

The court is unable to consider this as a mitigating factor as all persons appearing in our courts are equal before the law and are entitled to equal protection of the law: See art. 8 of the Federal Constitution. As a matter of fact, the 3rd defendant's participation in the business and corporate sector demonstrates that she is not a member of the under-privileged society and so is not a person who is less likely to understand the implications of a breach or contravention. After all, she has a large team of able and learned advocates and solicitors at her disposal to give her first-hand and immediate sound legal advice.

Treatment For "Breach Or Contravention Contempt"

The gist of the submissions by learned counsel for the 3rd defendant is that this court should impose a non-custodial sentence on the ground that contempt arising out of a breach or contravention of a court order ("breach or contravention contempt") is a less serious class of contempt when compared to "media contempt" which prejudices the fair trial of sub-judice proceedings.

I shall now examine the authorities in some detail in order to determine the sentencing trend in relation to the category of contempt which is called into question in this case ie, "breach or contravention contempt". Under this category, the sentences imposed by our courts, in two cases at least, are non-custodial sentences *viz* a fine of RM7,000 in *Chung Onn v. Wee Tian Peng, supra,* for contempt of court arising out of an advocate and solicitor's act of aiding and abetting in the transfer of a property in contravention of an undertaking given to the court and such undertaking has been incorporated into a consent order.

The Supreme Court, in *Wee Choo Keong v. MBf Holding Bhd & Another & Another Appeal* [1995] 3 MLJ 549, imposed a similar fine of RM7,000 on an advocate and solicitor for his act of evading the service of a court order.

However, in a recent case in which an advocate and solicitor was found guilty of contempt by breaching an injunction, the Court of Appeal affirmed the sentence of one month's imprisonment imposed by the High Court: *Lee Lim Huat v. Yusof Khan bin Ghown Khan & Another* [1997] 3 CLJ 197; [1997] 2 MLJ 472.

Sentencing: A Judicial Discretion

The law confers upon our courts an unfettered discretion in the exercise of the jurisdiction relating to sentencing. This discretion is however a judicial discretion which must be exercised in accordance with established judicial principles, having regard to the particular matrix of facts and circumstances in each particular case.

Uniformity of sentence is not possible and is indeed a misnomer. Hence, when it comes to sentence, subject to questions of policy, each case must be dealt with according to its own facts: *Lee Lim Huat v. Yusuf Khan bin Ghows Khas & Another* [1997] 2 MLJ 427, 486 CA.

The Appropriate Sentence To Be Meted Out

The nature of the two acts of contempt committed by the 3rd defendant are indeed very serious, as has been reflected in the principal judgment.

In *Chung On v. Wee Tian Peng, supra*, I observed that pursuant to art. 126 of the Federal Constitution, the Federal Court, the Court of Appeal and the High Courts have the jurisdiction to punish any contempt of itself. Our superior courts have theoretically unlimited plenary power to mete out any sentence for contempt of court.

In the *Chung On* case, *supra*, I also said that a custodial sentence by way of imprisonment as a major sanction in a case of civil contempt is to be imposed only in the most serious cases. The seriousness will be judged by reference to the unrelenting interference with due administration of justice and the unmitigated culpability of the offencer, with the latter perhaps being the key factor (see *R v. Thomson Newspapers Ltd & Ors* [1968] 1 All ER 268 at p. 270) and *The Law Of Contempt* (3rd edn 1996) by Nigel Lowe and Brenda Sufrin at p. 527.

The call by Abdul Hamid, LP in *Trustees Of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v. SM Idris Another* [1990] CLJ 723 for a custodial sentence in future contempt cases was indeed echoed in 1996 by KL Rekhraj, JC (now J). Had it not been for the intervention and the plea by learned representative of the learned Attorney-General, K.L. Rekhraj, JC (now J) in *Anthony Ratos s/o Domingos Ratos v. City Specialist Centre Sdn Bhd (t/a) City Medical Centre (Attorney-General, Intervener)* [1996] 3 MLJ 349 at p. 360 would have had no hesitation in imposing a custodial sentence in response to the signal by Abdul Hamid, LP in the *Khoo Kongsi* case, *supra*. Nevertheless, the learned Judicial Commissioner observed that "for the future, where the contempt is grave – as in this case – no fine will do, as the haughty and well to do contemnors will scornfully throw their money in the face of the court and get away with the least degree of remorsefulness and compunction. Let the contemnors be warned that imprisonment shall be the order of that day. The courts will no longer be moved by mitigating circumstances."

In *Dr Leela Ratos & Others v. Anthony Ratos s/o Domingos Ratos & Others* [1997] 3 CLJ Supp 330; [1997] 1 MLJ 704, Kamalanathan Ratnam, JC (now J) at p. 734 gave effect to the above signal and warning of the then Lord President and imposed a custodial sentence of one day's imprisonment and a fine of RM50,000 in default six months' imprisonment on an advocate and solicitor for contempt *ex facie curiae* by deliberately misleading the court.

As I have noted above, in *Lee Lim Huat v. Yusuf Khan bin Ghows Khan & Another* [1997] 3 CLJ 197; [1997] 2 MLJ 472 the Court of Appeal affirmed the sentence of one months' imprisonment imposed by the High Court in respect of the contempt committed by an advocate and solicitor, by beaching an injunction. The Court of Appeal added that the sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would – be violaters of injunctions.

In my view, the conduct of the 3rd defendant in committing two acts of contempt cannot be classified as a reasonable conduct to attract a relatively lenient treatment from this court. It is hardly justified for any person in the position of the 3rd defendant to commit a breach or contravention on 30 August 1997 and then to repeat it on 23 October 1997. These two acts of the 3rd defendant clearly constitute an unrelenting interference with the due administration of justice and the unmitigated culpability of the 3rd defendant. The Court of Appeal in *Lee Lim Huat v. Yusuf Khan bin Ghows* [1997] 3 AMR 2401 followed the Supreme Court in *Wee Choo Keong v. MBf Holdings Bhd & Anor* [1993] 2 MLJ 217, 220 where Abdul Hamid Omar, LP said:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

Indeed, it is absolutely pertinent to add that the injunction which the 3rd defendant has breached or contravened, had been affirmed by the Court of Appeal which had dismissed all the defendants' appeal against the said injunction given on 20 August 1997. The 3rd defendant has little or no regard for the order of the court. Even on 27 July 1998 ie, the very day when this court delivered the decision pertaining to the convictions of the 3rd defendant on the aforesaid two counts of contempt, the 3rd defendant had conveniently failed to attend court when the court was in session and when she knew that she had been ordered to attend court. The date 27 July 1998 was fixed according to her convenience as on 24 July 1998, the original date fixed for decision by this court, the 3rd defendant was getting married. Every latitude has been given to the 3rd defendant and even when she was ordered to attend court, she has unjustifiably refused to obey the order of the court. Her learned counsel had to trace her whereabouts to ensure her attendance, after citing an alleged breakdown in communication as an unverified excuse.

In my view, it is high time that our judiciary shows its abhorrence to the two acts of contemptuous conduct, as illustrated by the facts and circumstances of this case. Therefore, the court must fulfil its responsibilities by passing an appropriate sentence on each count to reflect the extreme seriousness. Our courts would not be doing their duties and indeed would be acting against public interest, especially having regard to the facts and circumstances of the instant case, by imposing a mere fine especially in respect of the 2nd conviction. Public policy and public interest call for the existence of the law of contempt in order to ensure eg, that orders of the court are not breached or contravened and that due administration of justice is not put in jeopardy. It is true that in *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp. 518, 562 g-h, I have stated that "breach or contravention contempt" is less serious than "media contempt". In *Chandra Sri Ram, supra*, for the first offender in media contempt, I had imposed a custodial sentence of three months' imprisonment. That being the case, for the first act of "breach or contravention contempt" committed by the 3rd defendant on 30 August 1997, in order to reflect its less serious nature, I do not consider it appropriate to impose a custodial sentence. Instead I hold that a fine is an appropriate sentence. On the facts of this case, I impose a fine of RM30,000 or two months imprisonment in default of payment.

As regards the second count of contempt, a more serious view has to be taken. In my judgment, the appropriate sentence for the second count of contempt must inevitably be a custodial sentence. On the facts of this case, I hereby impose a sentence of three (3) months' imprisonment on the 3rd defendant which I consider as a fair and reasonable sentence.

The 3rd defendant is also ordered to pay the costs of the entire committal proceedings from its commencement until its conclusion today.